Supreme Court, U.S.
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No.00-921

In the Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY,

Petitioner,

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE OTHER COURTS OF APPEALS AND THE FCC.

A. The Carriers' contention (at 6) that "there is no genuine division among the circuits" on the question presented in Ameritech's petition rests on a misreading of the relevant decisions. Notably, even the Carriers do not include the Eighth Circuit within the grouping of circuits that purportedly "have agreed that a claim like Ameritech's in this case * * * raises issues of *state* law." Carriers Br. 6 (emphasis in original). At the same time, however, the Carriers cannot bring themselves to admit that in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942 (8th Cir. 2000), the Eighth Circuit found such a claim to be federal in nature. But that clearly was the Eighth Circuit's conclusion.

In *Connect*, the district court — expressly following the Seventh Circuit's decision below (see *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 72 F. Supp. 2d 1043, 1049 (E.D. Ark. 1999)) — ruled that the Act "'does not give the federal district courts jurisdiction to review a state commission's interpretation and enforcement of a privately negotiated interconnection agreement because that is a matter of state contract law that should properly be reviewed by a state court.'" *Connect*, 225 F.3d at 947. In an amicus brief filed in the Eighth Circuit, one of the Carrier respondents (MCI WorldCom, represented by the same counsel appearing before this Court) urged the Eighth Circuit to affirm the district court on the ground that the "district court, in substance, correctly applied" section 252(e)(6), because "[t]he Act leaves resolution of state law claims to state courts." Brief of Amicus Curiae MCI WorldCom in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, No. 99-3952, at 12 (filed Feb. 29, 2000). MCI also asserted that the First and Seventh Circuits "have held that claims that a state commission misinterpreted the terms of an interconnection agreement are governed by state law and should be reviewed by state courts" and urged the

Eighth Circuit not "to split with the well-reasoned decisions of the First and Seventh Circuit." *Id.* at 21-22. The Eighth Circuit reversed, stating that it "disagree[d]" with the rationale and holding of the district court (as quoted above), and upholding federal jurisdiction over Southwestern Bell's contention that the Arkansas Commission violated federal law by imposing obligations that deviated from the obligations set forth in Southwestern Bell's binding interconnection agreement. *Connect*, 225 F.3d at 947. In rejecting the notion that "this case is simply a matter of state contract law," the Eighth Circuit repeatedly stressed the "federal" nature of Southwestern Bell's claims. *Id.* at 947-48.

The Carriers gloss over the extensive quotations from the Eighth Circuit decision that Ameritech has cited above and in its petition, and hone in on the only sentence in the court's decision that even adverts to the possibility that the federal courts will not have the "final say" in matters relating to interconnection between carriers. In that sentence, the Eighth Circuit observed that in striking a "compromise" between "federal uniformity and state autonomy," Congress decided that "[w]ith regard to *purely* state law issues, the state commissions may have the final say." *Connect*, 225 F.3d at 948 (emphasis added). The Carriers would like the Court to infer from that sentence that the Eighth Circuit viewed Southwestern Bell's "interpretation" claim as arising under state law. When that sentence is placed in context, however, precisely the opposite inference is warranted.

The Eighth Circuit appended a citation to the First Circuit's decision in *Puerto Rico Tel. Co.* v. *Telecommunications Regulatory Bd.*, 189 F.3d 1 (1st Cir. 1999), to the sentence on which the Carriers rely. In *Puerto Rico*, the court found that it lacked jurisdiction to review an aggrieved carrier's claim because the "portion of the Board's order" at issue did "*not interpret the agreement*" at all, but rather applied a Puerto Rico

statute concerning the rights of telephone company customers. *Id.* at 11-12 (emphasis added).[1] It is a claim of *that* nature that the Eighth Circuit obviously was referring to in concluding that "purely state law issues" are not cognizable in federal court under section 252(e)(6). *Connect*, 225 F.3d at 948. But as the Eighth Circuit noted in the very next sentence of its opinion, this Court has stated that "there is no doubt * * * that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.* (quoting *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999)). Where, as here and in *Connect*, an aggrieved carrier alleges that a state commission determination concerning the parties' rights and obligations under a section 252 interconnection agreement "violated federal law * * * it is entitled to the District Court's consideration of that claim" under section 252(e)(6) of the Act. *Connect*, 225 F.3d at 948.

B. The Carriers next dispute whether the FCC necessarily concluded in *In re Starpower Communications*, 15 F.C.C.R. 11277 (2000), that a claim identical in all material respects to Ameritech's claim here is federal in nature and thus reviewable in federal court under section 252(e)(6). In *Starpower*, the FCC held that it would preempt a state commission's jurisdiction and "proceed to resolve" a single question: "*whether the existing interconnection agreements between Starpower and GTE and*

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[1] In view of the First Circuit's holding that state commission action "fall[s] within the jurisdictional bounds of § 252(e)(6)" if the aggrieved party's complaint alleges "a substantial nexus between the commission's determination and an interconnection agreement" (189 F.3d at 9-10), it is clear that the First Circuit would agree with the Eighth Circuit (and disagree with the Seventh Circuit) that Ameritech's claim that the ICC refused to enforce an express limitation on the scope of Ameritech's obligations under its agreements with the Carriers is reviewable in federal court under section 252(e)(6).

Bell Atlantic require GTE and Bell Atlantic to pay compensation to Starpower for the delivery of ISP-bound traffic." *Id.* ¶ 9 (emphasis added). And as the Carriers concede (at 13), the FCC unmistakably expressed its view that its "findings" regarding that issue would be reviewable in a federal court of appeals pursuant to the Hobbs Act, as mandated under section 252(e)(6). The FCC's decision establishes conclusively that a claim like that asserted by Ameritech in this case arises under federal law, because (i) if such a claim arose under state law (as the Seventh Circuit held and as the Carriers continue to insist) and (ii) that claim were the only issue in the case (as was the case in *Starpower*), there would be no basis for a Hobbs Act court to exercise federal judicial power under Article III. It is well settled that a federal court lacks jurisdiction under Article III of the Constitution to decide a case between non-diverse parties in which the sole issue presented is one of state law. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). Even if the Carriers are correct that "[f]ederal agencies routinely apply state law, subject to federal court review" (Carriers Br. 13), federal courts do not review cases or controversies of any kind without a jurisdictional basis under Article III.

The case that the Carriers cite, *Nicor Exploration Co.* v. *FERC*, 50 F.3d 1341 (5th Cir. 1995), illustrates our point. That case does not even suggest, much less hold, that federal courts may decide pure state law contract claims in the absence of any other basis for Article III jurisdiction. While the court did not expressly address the basis for its jurisdiction, the very first sentence of the opinion indicates the existence of a federal question in the case: a petition "to review a Federal Energy Regulatory Commission order granting * * * authority to collect incentive-based rates for natural gas pursuant to" a federal statute. *Id.* at 1344. The fact that a federal court may review a federal agency's application of state law when a state

law claim is ancillary to a federal claim within the scope of an Article III court's federal question jurisdiction or when federal common law looks to state law for a rule of decision says nothing at all about whether a federal court has Article III jurisdiction over a case in which the sole claim arises under state law — which would have been the case in *Starpower* under the Carriers' argument (and the decision below). In fact, an Article III court lacks jurisdiction over such a case.

C. Both the Eighth Circuit's decision in *Connect* and the FCC's decision in *Starpower* clash directly with the decision below on the question whether a claim like that asserted by Ameritech here is reviewable in federal or state court. Moreover, the decisions of the Tenth Circuit in *Southwestern Bell Tel. Co.* v. *Brooks Fiber*, 235 F.3d 493 (10th Cir. 2000), and the Fifth Circuit in *Southwestern Bell Tel. Co.* v. *Public Utility Comm'n*, 208 F.3d 475 (5th Cir. 2000), also have squarely rejected the Seventh Circuit's bifurcated review scheme and have permitted claims that a state commission has disregarded express limitations on the scope of a carrier's obligations under a section 252 agreement to be reviewed in federal court. The Tenth Circuit concluded (erroneously, we believe) that such a claim arises under state law, but found the claim cognizable in federal court under 28 U.S.C. § 1367. *Brooks Fiber*, 235 F.3d at 498. The Tenth Circuit believed that the Fifth Circuit had "at least implicitly" reached the same conclusion under the same rationale (*id.*), but the Fifth Circuit's holding suggests otherwise. In concluding that "federal jurisdiction *under the Act* * * * permit[s] district courts * * * to review" issues such as "the questions of interpretation of the contracts" under a deferential standard of review (208 F.3d at 482, 485) (emphasis added), the Fifth Circuit indicated (albeit obliquely) that questions relating to the interpretation of section 252 agreements arise under federal law (section 252(e)(6)), but are to be resolved by applying "state law principles" as the rule

of decision. In any event, even if the Carriers were correct in asserting that the Fifth Circuit would treat Ameritech's claim here as a state law matter, that court, like the Eighth and Tenth Circuits, unmistakably rejected the Seventh Circuit's unduly narrow construction of the scope of federal review.

In sum, the circuits are divided, and in some respects fractured, with respect to the question presented in this petition: whether a claim that a state commission "determination" concerning the rights and obligations of the parties to section 252 interconnection agreement deviated from the plain terms of that agreement is reviewable in federal court.

II. THIS COURT SHOULD RESOLVE THE CONFLICT ON THIS IMPORTANT AND FREQUENTLY LITIGATED QUESTION.

The Carriers agree that interconnection agreements are a "key feature of the system set up by the 1996 Act," which "imposes a new set of federal standards and procedures governing interconnection between incumbent local companies and potential competitors." Carriers Br. 1, 2. And the Carriers do not dispute the heavy volume of litigation nationwide involving issues relating to the interpretation of scores of disputes over the parties' rights and obligations under federally mandated section 252 interconnection agreements. Nevertheless, the Carriers contend that this Court should "defer addressing the issues raised" here until a few more circuits weigh in on the question presented. *Id.* at 6-7; see also *id.* at 16-17. But the fact that other circuits are likely to choose one side or another of a conflict simply underscores Ameritech's point that the question presented is important and that it arises frequently. Once the Fourth, Sixth, and Eleventh Circuits issue their decisions, the Carriers no doubt will argue in cases that are decided in their favor that the Court should wait for the First, Second, Third, and D.C. Circuits as well. In view of the

confusion in the circuits that already exists and the centrality of interconnection agreements to the "new federal regime" that governs "a crucial segment of the economy worth tens of billions of dollars" (*AT&T Corp.*, 525 U.S. at 379 n.6, 397), there is no justification for delaying this Court's much needed guidance until every circuit has rendered an opinion on the issue.

The Carriers also contend that this Court should stay its hand because "relevant issues concerning reciprocal compensation for calls to ISPs are reportedly the subject of impending federal agency and potential legislative action." Carriers Br. 7. But even if those rumored proceedings yield tangible results, those results would have no bearing on the question presented in Ameritech's petition. That question does not even mention reciprocal compensation, and neither the FCC's decision on remand in *Bell Atlantic* nor any legislative proposal of which we are aware would obviate the need for deciding this question. (Indeed, as shown above, in *Starpower* the FCC already indicated its views on the question presented.) The importance of the jurisdictional question presented here is not tied in any way to the substance of any particular type of interconnection agreement dispute arising under the 1996 Act.

III. THE SEVENTH CIRCUIT'S DECISION IS PLAINLY WRONG.

The Carriers' contention that review should be denied on the ground that the decision below is actually correct is wholly unavailing. Notwithstanding the confusion and disarray in the courts of appeals discussed above, the one proposition on which all of the courts agree is that the Seventh Circuit's decision is wrong. As the Tenth Circuit observed, the bifurcated

jurisdictional scheme that the Seventh Circuit felt compelled to adopt is "absurd." *Brooks Fiber*, 235 F.3d at 498 n.2.[2]

That scheme not only results in what the Tenth Circuit described as a "waste of judicial resources" (*Brooks Fiber*, 235 F.3d at 498), but it is contrary to the structure and frustrates the manifest purposes of the Act. It is universally accepted that when a state commission imposes obligations on a carrier in arbitrating an interconnection agreement dispute, the commission's determination is reviewable in federal court under section 252(e)(6) for compliance with federal law. And as the FCC has observed, "[s]tate commission determinations that interpret and give effect to interconnection agreements are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act." Brief for the United States and the FCC as Intervenors in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, No. 99-3952, at 19 (8th Cir. filed Mar. 22, 2000). But under the decision below, whether a carrier may obtain federal judicial review of a state commission decision concerning a dispute over the carriers' interconnection obligations turns solely on the timing of the dispute. This makes no sense. Denying federal review over state commission determinations that are identical in substance simply because "the dispute * * * remained latent until after the agreement was approved" plainly "defeat[s] the federal oversight Congress intended." *Id.* at 20 n.8. As the "structure" of the Act reveals, "Congress intended to provide for federal court review of any regulatory determination made under [section 252], whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place" *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222

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[2] Contrary to the Carriers' suggestion (at 11), the Seventh Circuit plainly viewed the "forced bifurcation" as compelled by the Act, not by the Eleventh Amendment or this Court's decision in *Pennhurst*. See Pet. App. 17a.

F.3d 323, 341 (7th Cir. 2000), cert. denied, 69 U.S.L.W. 3297 & 3346 (U.S. Jan. 22, 2001) (Nos. 00-653 & 00-744).[3]

The section 252 agreements at issue here, like many similar agreements, incorporate provisions that "plainly track[] controlling law," and thus require state commissions and courts construing those provisions to give meaning to the parties' intent to implement the "requirements of the Act." *AT&T Communications* v. *BellSouth Telecommunications*, 229 F.3d 457, 465 (4th Cir. 2000).[4] When parties to federally mandated section 252 agreements choose to negotiate "with regard to the 1996 Act" (*id.*) in implementing the Congressionally prescribed procedural and substantive framework for local telecommunications competition, they have a federally guaranteed right to hold other parties to the terms of the deal. As one court recently held, under section 252(a)(1) of the Act,

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[3] The Carriers attempt to camouflage the unanimous view of the circuits that state commission actions "interpreting" interconnection agreements are regulatory "determinations under" section 252 by stating that "[f]our circuits * * * have all held that a federal court does have jurisdiction under section 252(e)(6) to consider whether a state commission violated federal law in a ruling *enforcing* a previously approved interconnection agreement." Carriers Br. 6 (emphasis in original). See also *id.* at 18 ("Section 252(e)(6) applies to review of state commission 'enforcement' determinations"). What the decisions of those circuits actually hold, however, is that *both* "interpretation" and "enforcement" decisions are "determinations under" section 252. See Pet. 14 n.3.

[4] And as the FCC has explained, although a negotiated agreement "need not comply" with the requirements of the Act, "it is critical to recognize that even 'freely' negotiated agreements are formed against the backdrop of mandatory obligations under section 251 that will be imposed through arbitration if the parties fail to agree." Brief for the United States and the FCC as Intervenors in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, No. 99-3952, at 26 n.13.

"interconnection agreements are binding documents," and a state commission thus "violate[s] the Act" when it disregards express limitations on the rights and obligations of the parties as set forth in the agreement and imposes obligations inconsistent with that agreement. *Michigan Bell Tel. Co.* v. *MCI Metro Access Transmission Services, Inc.*, No. 00-70636, slip op. at 19 (E.D. Mich. Jan. 22, 2001). Ameritech has alleged precisely the same state commission action here, and if Ameritech can prove its claim, the state commission will have "regulated in a manner that is inconsistent with the Act." *Id.* at 20. The court below erred in concluding — contrary to the decisions of the Fifth, Eighth, and Tenth Circuits and the FCC — that a claim of this nature must be litigated in state court. Because Ameritech's claim seeks review of the commission's determination for compliance with federal law requirements created by the Act, it arises under federal law and falls directly within the scope of federal jurisdiction under section 252(e)(6).[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] Contrary to the Carriers' assertion, *Jackson Transit Authority* v. *Local Division 1285*, 457 U.S. 15 (1982), in no way supports the result in the Seventh Circuit. In *Jackson*, this Court reaffirmed the principle that "a plaintiff state[s] a federal claim when he sue[s] to vindicate contractual rights set forth by federal statutes, [even though] the relevant statutes lacked express provisions creating federal causes of action." *Id.* at 22. The Court found that this principle did not apply in *Jackson*, however, because the legislative history of the relevant statute established "conclusive[ly]" that "Congress intended that labor relations between transit workers and local governments would be controlled by state law." *Id.* at 24. In sharp contrast, Ameritech is suing here under an express federal right of action under section 252(e)(6) to enforce rights implementing the 1996 Act and made binding by section 252(a)(1) of the Act.

Respectfully submitted.

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